In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 692

SANDY SOMMERVILLE, TRADING AND DOING BUSINESS UNDER THE NAME AND STYLE, NEW WILMINGTON LIVESTOCK AUCTION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Although we believe that the decision below is correct, we do not oppose the petition. The decision is in conflict with decisions of the Courts of Appeals for the Fourth and Eighth Circuits and the issue presented is a recurrent one.

1. The ultimate question presented in this litigation concerns the liability in conversion of a livestock auctioneer who, without the knowledge or consent of

the United States, sold livestock in which an agency of the United States had a perfected security interest securing an operating loan pursuant to the Bankhead-Jones Farm Tenant Act, 60 Stat. 1071, 7 U.S.C. 1007.[1] At the threshold is the question whether liability is governed by a uniform federal rule or by the law of the State in which the lien was recorded and the sale took place. The petition for a writ of certiorari raises only this choice-of-law issue (Pet. 2).

The relevant facts are not in dispute. Pursuant to the Bankhead-Jones Farm Tenant Act, the Farmers Home Administration (FHA), an agency of the Department of Agriculture, made operating loans to one Flickinger, who in turn executed a security agreement in favor of FHA to secure repayment of the loan. The agreement encumbered farm chattels, including the livestock which are the subject of this suit, and provided that the borrower was not to sell any of the encumbered property without first obtaining the consent of the government. The security agreement was duly recorded pursuant to Pennsylvania law, FHA thereby acquiring a perfected security interest in the encumbered property.[2]

Nine months after the recordation, Flickinger, without the knowledge or consent of FHA, delivered

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[1] In 1961 that Act was repealed and replaced by 75 Stat. 310, *et seq.*, 7 U.S.C. 1941, *et seq.*

[2] Under the Uniform Commercial Code, adopted in Pennsylvania, transactions of this kind are covered by security agreements rather than by chattel mortgages. See 12A Purdon's Penna. Stats., § 9-101, *et seq.*

three of the secured livestock to petitioner for sale by him at his auction. Petitioner, who did not have actual knowledge of the government's security interest, sold the livestock in the regular course of his auction business. The United States thereafter commenced this action in conversion against petitioner to recover the reasonable market value (the price received at the auction) of the livestock sold by petitioner.

The district court held that the action was governed by Pennsylvania law. Determining that petitioner was liable under that law, the court entered judgment for the United States.

In affirming, the majority of the court of appeals (per Biggs, C.J.) rejected the determination that state law controls. Citing decisions of this Court,[1] the majority concluded that "an independent federal rule of decision must be applied when a genuine federal interest would be subjected to uncertainty by application of disparate state rules" (Pet. App. 15). The requisite federal interest was found to exist by reason of the fact that FHA had obtained its security interest pursuant to an act of Congress and "the interest of the United States in the administration of the loan program would be undermined and its power to protect its purse limited if disparate laws of individual states were applied to substantially identical loan transactions" (Pet. App. 19).

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[1] *Howard* v. *Lyons*, 360 U.S. 593; *United States* v. *Standard Oil Co.*, 332 U.S. 301; *United States* v. *Allegheny County*, 322 U.S. 174; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363.

After examining the weight of authority governing the imposition of tort liability on an auctioneer in circumstances such as those present here, the court held, as a matter of federal law, that petitioner was liable to the government for the conversion.[4]

In a concurring opinion, District Judge Steel expressed the view that State law should govern. While noting that there were no Pennsylvania decisions determining the liability of an auctioneer in a comparable situation, he concluded that the Pennsylvania courts would impose liability if confronted with the question. The remaining judges of the panel did not pass upon that question.

2. The question whether a uniform federal rule or State law governs the liability of a livestock auctioneer or commission merchant who sells property in which FHA has a security interest has now been examined by four courts of appeals. These courts have divided equally in their resolution of the issue.

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[4] The court found unpersuasive petitioner's argument that the law of Pennsylvania must govern petitioner's liability since the security agreement states that it was "intended by the parties to serve as both 'Financing Statement' and 'Security Agreement' under the Pennsylvania law" and since the agreement was recorded as provided by state law. The court found that the recording of the security agreement, pursuant to Pennsylvania law, was merely an incident to the perfecting of FHA's lien on the livestock while "the genesis of the obligations, duties, and liabilities of the parties in this litigation lies in the Jones-Bankhead Act, and absent express congressional declaration of intent that state law shall be applicable, we are reluctant to subject federal rights and duties to the exceptional uncertainty and heterogeneity which may ensue in many cases" (Pet. App. 20-21).

The Ninth Circuit, in common with the court below, has held that a uniform federal rule controls and that, under that rule, there is liability. *United States* v. *Matthews*, 244 F. 2d 626. On the other hand, the Eighth Circuit (prior to *Matthews*) and the Fourth Circuit (subsequent to *Matthews*) applied State law. *United States* v. *Kramel*, 234 F. 2d 577 (C.A. 8); *United States* v. *Union Livestock Sales Co.*, 298 F. 2d 755 (C.A. 4).[5] In both of these cases, the United States had urged the application of a uniform federal rule.[6]

We believe that the court below and the Ninth Circuit in the *Matthews* case correctly determined the issue. However, in view of the conflict among the circuits the government does not oppose the petition.

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[5] This decision presents the first occasion for the government to obtain review of the conflict which arose when *Matthews* was decided in favor of the FHA and the application of federal law. In the next case, *Union Livestock*, the court ruled against the government on the choice-of-law question, but held the auctioneer liable under state law. The private party did not file a petition for writ of certiorari.

[6] In the *Matthews* case, both parties had urged that a uniform federal rule applied. The court of appeals found it necessary, however, to decide the choice-of-law question apparently because of (1) the prior contrary decision of the Eighth Circuit in *Kramel*, and (2) the holding of the district court (139 F. Supp. 683) that federal law exonerated the auctioneer from liability in conversion. Had the court of appeals concurred in the *Kramel* holding, it would not have been required to pass upon the correctness of the district court's view of the federal law. There was no question that California law imposed liability. *Swim* v. *Wilson*, 90 Cal. 126, 27 Pac. 33; *Lusitanian-American Development Co.* v. *Seaboard Dairy Credit Corp.*, 1 Cal. 2d 121, 34 P. 2d 139.

Indeed, in light of the extensive, nation-wide FHA loan program,[7] it would be to the interest of the government to have the question resolved. Nonetheless, we should point out that it is questionable whether resolution of the issue will make ultimate difference in the outcome of this case since both the district court and the concurring judge in the court of appeals were of the view that petitioner was liable under State law.[8]

Respectfully submitted,

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[7] Between November 1, 1946, and June 30, 1962, 1,311,684 loans totalling $2,260,451,761 were made to farmers in every state, Puerto Rico, and the Virgin Islands. Of these totals 15,390 loans amounting to $38,302,933 were made in Pennsylvania alone.

[8] As noted above, the majority of the court of appeals, in holding that federal law applied and that petitioner was liable under that law, did not reach the question of liability under State law.

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